

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSE AGUILAR,

3:16-cv-00529-MMD-CBC

Aguilar,

v.

A M E N D E D¹
REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE²

MICHAEL KOEHN, *et al.*,

Defendants.

This case involves a civil rights action filed by Aguilar Jose Aguilar ("Aguilar") against Defendants Michael B. Koehn, M.D., Warden Renee Baker, and Sergeant Curtis Kerner. (Collectively referred to as "Defendants"). Currently pending before the Court is a motion for summary judgment filed by Defendants. (ECF No. 42.) Aguilar responded, (ECF No. 53), and Defendants replied. (ECF No. 62). In addition, Aguilar also filed a cross-motion for summary judgment, (ECF No. 54), which Defendants responded to. (ECF 64). Having thoroughly reviewed the record and papers, the Court hereby recommends that Defendants' motion for summary judgment be granted, (ECF No. 42), and Aguilar's Cross-Motion for summary judgment should be denied. (ECF No. 54.)

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. Procedural History

Aguilar is an inmate in the custody of the Nevada Department of Corrections ("NDOC") and is currently housed at Ely State Prison ("ESP"). On June 11, 2016, Aguilar

¹ This amendment supersedes the report and recommendation ECF No. 66 as it corrects a typographical error on page 17 listing defendants' motion for summary judgment as ECF No. 57. The docket number has been corrected to ECF No. 42.

² This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 commenced a civil action in the Seventh Judicial District Court of the State of Nevada:
2 *Aguilar v. Nevada ex rel., Baker, Koehn and Kerner*, Case No. CF-1607007, Dept. I,
3 which was removed to federal court on September 9, 2016. (ECF No. 1.)

4 Pursuant to 28 U.S.C. § 1915A(a), the Court screened Aguilar's complaint on
5 August 3, 2017 and allowed Counts I through V to proceed. The Claims arise from a
6 series of events involving Mr. Aguilar's medical treatment while in custody.

7 B. Factual Background

8 The events giving rise to Aguilar's claims, as alleged in the Complaint, are as
9 follows. On May 18, 2015, Aguilar saw Dr. Koehn concerning a possible herniated disc
10 and a pinched nerve in his back. (ECF No. 1-2 at 4.) Dr. Koehn gave Aguilar "simple
11 pain medication and analgesic balm." (*Id.* at 5.) On June 29, 2015, Aguilar requested to
12 see medical because he was in "excruciating pain" and the pain medication was not
13 working. (*Id.*) However, Dr. Koehn refused to see Aguilar for four weeks. (*Id.*)

14 Thereafter, on July 20, 2015, Dr. Koehn refused to see Aguilar again despite
15 Aguilar's "extreme, excruciating pain" and the numbness in his back. (*Id.*) At 6:00 p.m.,
16 Aguilar could no longer take the pain and collapsed in his cell. (*Id.*) Prison officials took
17 Aguilar to the infirmary and left him unattended in the infirmary for three days, at which
18 point he was provided pain shots to numb Aguilar's back. (*Id.*)

19 On July 30, 2015, Dr. Koehn prescribed Aguilar high blood pressure medication.
20 (*Id.*) Aguilar told Dr. Koehn that he had never had high blood pressure and had never
21 taken medication for it. (*Id.*) Dr. Koehn never informed Aguilar of the possible health risks
22 or side effects associated with the medication. (*Id.* at 5-6.) A couple of days later, Aguilar
23 informed a nurse that he was not feeling good, felt very weak, and felt dizzy with vertigo.
24 (*Id.* at 6.) The medical staff told Aguilar to continue taking his high blood pressure
25 medication and that everything would be fine. (*Id.*)

26 On August 10, 2015, at 1:00 a.m., Aguilar started to vomit and have seizures in
27 his cell. (*Id.*) Both the medical and CERT teams arrived to see Aguilar vomiting and
28 having uncontrollable seizures. (*Id.*) At 6:00 a.m., during a seizure, Aguilar blacked out.

1 (*Id.*) At this point, medical and CERT teams took Aguilar to the infirmary where someone
2 ordered officials to take Aguilar to the hospital. (*Id.*) Before, Aguilar could go to the
3 hospital, Kerner screamed and yelled multiple expletives at Aguilar for two hours. (*Id.*)
4 Kerner told Aguilar, “you better confess that you took drugs/narcotics or else you will not
5 get any medical attention.” (*Id.*)

6 At 10:00 a.m., prison officials transported Aguilar to Ely Washbrook Hospital. (*Id.*)
7 After taking blood tests, hospital officials found no traces of any narcotics or drugs in
8 Aguilar’s blood system. (*Id.* at 8.) However, after analyzing Aguilar’s blood tests, the
9 doctors determined that the cause of Aguilar’s seizures was the high blood pressure
10 medication. (*Id.*) On August 12, 2015, prison officials transported Aguilar back to ESP’s
11 infirmary where the medical staff gave Aguilar the exact same high blood pressure
12 medication. (*Id.*)

13 In Count I, Aguilar alleges an Eighth Amendment violations against Dr. Koehn for
14 refusing to administer proper medical care related to back pain and refusing to see
15 Aguilar for treatment. (*Id.*) Aguilar asserts that he was left untreated and was in extreme
16 pain for a total of eighteen (18) days. (*Id.*, at 10.) In Count II, Aguilar alleges an Eighth
17 Amendment violation against Dr. Koehn for prescribing Aguilar high blood pressure
18 medication and for failing to warn him of the adverse health risks. (*Id.* at 12.) In Count III,
19 Aguilar alleges an Eighth Amendment violations for cruel and unusual punishment
20 against Kerner based upon his alleged yelling and threatening Aguilar to confess taking
21 narcotics when he was taken to the infirmary. (*Id.* at 14.) In Count IV, Aguilar alleges an
22 Eighth Amendment violation against Dr. Koehn for prescribing Aguilar high blood
23 pressure medication that caused him to suffer from seizures. (*Id.* at 18.). In Count V,
24 Aguilar alleges an Eighth violations against Kerner for deliberate indifference to his
25 medical need and Baker based on supervisory liability. (*Id.* at 21.)

26 C. Motions for Summary Judgment

27 On August 15, 2018, Defendants filed a motion for summary judgment seeking
28 dismissal of all the claims. (ECF No. 42.) As to Counts II, III, IV, and V, Defendants

1 argue Aguilar failed to properly exhaust all available administrative remedies. (ECF No.
 2 42 at 9 – 12.) As to Counts I, and IV, Defendants argue they were not deliberately
 3 indifferent toward Aguilar’s medical needs because they believed he was malingering
 4 about his back pain, and that he had high blood pressure. (*Id.* at 14 – 17.) As to Count
 5 III, Defendants argue Aguilar’s claim is implausible. (*Id.* at 17.) As to Count V,
 6 Defendants argue Warden Baker lacked the personal participation required for a § 1983
 7 suit. (*Id.* at 18.)

8 In response, and cross-motion for summary judgment, Aguilar argues Defendants’
 9 motion for summary judgment should not be granted. (ECF Nos. 53; 54.) Aguilar broadly
 10 argues Defendants have failed to provide any admissible evidence to support their
 11 motion. (ECF No. 54.) As to the deliberate indifference claim against Koehn, Aguilar
 12 argues that he was not malingering, and that Koehn was aware of this fact. (ECF No. 54
 13 at 2 – 3.) As to the deliberate indifference claim against Sergeant Kerner, Aguilar argues
 14 that Kerner was present at the time of the incident, and this can be proved with
 15 circumstantial evidence. (ECF No. 54 at 3 – 4.) As to the supervisory liability claim
 16 against Warden Baker, Aguilar argues that Baker did have sufficient personal
 17 participation because she was aware of the grievances. (ECF No. 54 at 4.)

18 In reply, Defendants argue that none of Aguilar’s assertions are supported by the
 19 record. (ECF No. 64 at 3 – 6.). Defendants argue that, while Aguilar refers to the record,
 20 he either misinterprets evidence or make conclusory allegations. (ECF No. 64.) On the
 21 other hand, Defendants argue they have supported each of their assertions with
 22 admissible evidence which proves their version of the facts. (*Id.* at 6.)

23 **II. LEGAL STANDARD**

24 Summary judgment allows the court to avoid unnecessary trials. *Nw. Motorcycle*
 25 *Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court properly
 26 grants summary judgment when the record demonstrates that “there is no genuine
 27 issue as to any material fact and the movant is entitled to judgment as a matter of law.”
 28 *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). “[T]he substantive law will identify

1 which facts are material. Only disputes over facts that might affect the outcome of the
2 suit under the governing law will properly preclude the entry of summary judgment.
3 Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v.*
4 *Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute is “genuine” only where a
5 reasonable jury could find for the nonmoving party. *Id.* Conclusory statements,
6 speculative opinions, pleading allegations, or other assertions uncorroborated by facts
7 are insufficient to establish a genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509
8 F.3d 978, 984 (9th Cir. 2007); *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th
9 Cir. 1996). At this stage, the court’s role is to verify that reasonable minds could differ
10 when interpreting the record; the court does not weigh the evidence or determine its
11 truth. *Schmidt v. Contra Costa Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Nw.*
12 *Motorcycle Ass’n*, 18 F.3d at 1472.

13 Summary judgment proceeds in burden-shifting steps. A moving party who does
14 not bear the burden of proof at trial “must either produce evidence negating an essential
15 element of the nonmoving party’s claim or defense or show that the nonmoving party
16 does not have enough evidence of an essential element” to support its case. *Nissan*
17 *Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately,
18 the moving party must demonstrate, on the basis of authenticated evidence, that the
19 record forecloses the possibility of a reasonable jury finding in favor of the nonmoving
20 party as to disputed material facts. *Celotex*, 477 U.S. at 323; *Orr v. Bank of Am., NT &*
21 *SA*, 285 F.3d 764, 773 (9th Cir. 2002). The court views all evidence and any inferences
22 arising therefrom in the light most favorable to the nonmoving party. *Colwell v.*
23 *Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014).

24 Where the moving party meets its burden, the burden shifts to the nonmoving
25 party to “designate specific facts demonstrating the existence of genuine issues for
26 trial.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted).
27 “This burden is not a light one,” and requires the nonmoving party to “show more than
28 the mere existence of a scintilla of evidence. . . . In fact, the non-moving party must

1 come forth with evidence from which a jury could reasonably render a verdict in the
 2 non-moving party's favor." *Id.* (citations omitted). The nonmoving party may defeat the
 3 summary judgment motion only by setting forth specific facts that illustrate a genuine
 4 dispute requiring a factfinder's resolution. *Liberty Lobby*, 477 U.S. at 248; *Celotex*, 477
 5 U.S. at 324. Although the nonmoving party need not produce authenticated evidence,
 6 Fed. R. Civ. P. 56(c), mere assertions, pleading allegations, and "metaphysical doubt as
 7 to the material facts" will not defeat a properly-supported and meritorious summary
 8 judgment motion, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
 9 586–87 (1986).

10 For purposes of opposing summary judgment, the contentions offered by a *pro*
 11 se litigant in motions and pleadings are admissible to the extent that the contents are
 12 based on personal knowledge and set forth facts that would be admissible into evidence
 13 and the litigant attested under penalty of perjury that they were true and correct. *Jones*
 14 *v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

15 **III. DISCUSSION**

16 **A. Legal Standard for Exhaustion under the PLRA**

17 The Prison Litigation Reform Act of 1995 (PLRA) mandates that an inmate
 18 exhaust "such administrative remedies as are available" before bringing suit to
 19 challenge prison conditions. 42 U.S.C. § 1997e(a). *Ross v. Blake*, ___U.S.___, 136
 20 S.Ct. 1850, 1854-55 (2016). Therefore, pursuant to the PLRA, an inmate alleging a
 21 violation of his civil rights pursuant to 42 U.S.C. § 1983 *must* exhaust *all* the available
 22 administrative remedies prior to seeking judicial relief. 42 U.S.C. § 1997e(a); *McKinney*
 23 *v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (exhaustion of administrative remedies is
 24 a mandatory requirement); *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotation
 25 marks omitted).

26 In order to properly exhaust administrative remedies, the inmate must use "all
 27 steps the prison holds out, enabling the prison to reach the merits of this issue." *Griffin*
 28 *v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009). This requires complete "compliance

1 with the agency's deadlines and other critical procedural rules." *Woodford v. Ngo*, 548
 2 U.S. 81, 90-91 (2006). As exhaustion is mandatory under the PLRA, and the Supreme
 3 Court recently made clear that the courts do not have discretion to excuse the
 4 exhaustion requirement. *Ross*, 136 S.Ct. at 1854. Rather, the Supreme Court made
 5 abundantly clear that the courts may not excuse the exhaustion requirements under
 6 any type of special circumstances or extenuating circumstances. Rather, the inmate
 7 must strictly comply with the administrative procedures and processes required in order
 8 to properly exhaust. *Id.* The only exception is the exception provided by the statute,
 9 which states that a prisoner need not exhaust remedies if they are not available to the
 10 inmate. 42 U.S.C. § 1997e(a); *Sapp v. Kimbrell*, 623 F.3d 813, 822 (9th Cir. 2010).

11 B. NDOC Inmate Grievance System

12 The administrative remedies available to an inmate are determined, by the
 13 prison's own grievance process, not the PLRA. *Jones v. Bock*, 549 U.S. 199, 218 (2007).
 14 In the NDOC, when an inmate has a grievance, the administrative remedies available
 15 to them are the processes described in Administrative Regulation ("AR") 740. (ECF No.
 16 42, at Ex. L.) The inmate grievance process has three distinct steps: an informal level,
 17 a first level, and a second level. (*Id.*, at 4 – 9, §§ 740.5 – 07.) The inmate begins the
 18 grievance process by filing an informal level grievance. (*Id.* at 4 – 7, § 740.05.) At the
 19 informal level, inmates must submit all documentation and factual allegations available
 20 to them. (*Id.* at 6.) Failure by the inmate to submit a proper Informal Grievance form
 21 shall constitute abandonment of the inmate's grievance at this, and all subsequent
 22 levels. (*Id.*) Following receipt of a decision at the informal level of review, an inmate
 23 who disagrees with the decision may appeal to the first formal level of review within five
 24 (5) days. (*Id.* at 6 – 7, § 740.06.) Similarly, if an inmate disagrees with a decision at the
 25 first level of review, the inmate may appeal to the second level of review within five (5)
 26 calendar days of receipt of the prisoner's decision. (*Id.* at 8, § 740.07.) If an inmate fails
 27 to file a timely appeal from the first level to the second level, the inmate's appeal is
 28 procedurally barred. (*Id.* at 8, § 740.06(4)(A).) When this occurs, an inmate cannot

1 restart the grievance process on the same issue as this is considered an abuse of the
2 inmate grievance process. (*Id.* at 10, § 740.09(2)(B).)

3 C. Analysis

4 1. *Counts II and IV – Defendant Koehn*

5 Aguilar alleges that Koehn was deliberately indifferent to his medical needs
6 based on Koehn's prescription of high blood pressure medication to Aguilar. (ECF No.
7 1-2, pp. 11 – 12.) Further, Aguilar alleges that Koehn failed to warn of the potential side
8 effects of taking the high blood pressure medication. (ECF No. 1, at Ex. 2, pp. 17 – 19.)
9 Defendants argue that Aguilar's failure to mention or grieve any issues related to high
10 blood pressure medication at the informal level means that he did not properly exhaust
11 his administrative remedies on these claims. (ECF No. 42, at 10 – 11.)

12 In opposition, Aguilar does not present any evidence to show that he did in fact
13 file an informal grievance regarding Koehn prescribing high blood pressure medication.
14 (ECF No. 54.) Defendants acknowledge that Aguilar references high blood pressure
15 medication in the first and second level of grievance number 2006-30-05091. (ECF No.
16 42, at 10.) However, NDOC inmates are required to discuss all subjects of their
17 grievance at the informal level in order to properly exhaust. (ECF No. 42, Ex. L, at 7.) If
18 an inmate raises one issue in the informal level of a grievance, but goes on to raise
19 new, distinct issues in the first or second level, they failed to properly exhaust their
20 administrative remedies and they abandon their claim. (*Id.*) Accordingly, the fact that
21 Aguilar discusses Koehn prescribing him high blood pressure medication in the first
22 and second level grievances does not remedy the failure to mention it at the informal
23 level. *Ross*, 136 S. Ct. 1855 (PLRA mandates strict compliance with the administrative
24 remedies available to inmates and court's lack to discretion to consider any "special
25 circumstances" led to the failure to strictly comply with those requirements). Since
26 Aguilar did not properly exhaust his claims regarding high blood pressure medication,
27 the Court recommends that Defendants' Motion for Summary Judgment as to Counts II
28 and IV be granted.

2. *Count III and V – Sergeant Kerner*

In these claims, Aguilar alleges Sergeant Kerner was deliberately indifferent to Aguilar's serious medical needs. (ECF No. 1-2, pp. 13 – 16.) Specifically, Aguilar alleges that he began having seizure-like symptoms, but Kerner refused to take him to the hospital. (*Id.*, at 13 – 14.) Rather, Kerner delayed Aguilar's transport to the hospital for two hours, shouted expletives at him, and tried to get him to admit that he consumed narcotics. (*Id.*) Defendants argue that Aguilar's failure to mention or grieve the incident related to Kerner at the informal level means that he did not properly exhaust his administrative remedies. (ECF No. 42, at 11.)

In opposition, Aguilar does not present any evidence to show that he did in fact file an informal grievance regarding Kerner's alleged actions. (ECF No. 54.) Like the claims against Koehn *supra*, Aguilar never discusses, or even mentions Kerner, at the informal level of any of the grievances at issue. (ECF No. 42, at Ex. M – Q.) Defendants acknowledge that Aguilar discusses Kerner's alleged abuse at the first and second level of grievance number 2006-30-05091. (ECF No. 42, at 11.) However, the fact that Aguilar brings up the incident with Kerner at the first and second level grievances does not remedy the failure to discuss it at the informal level. (ECF No. 42, at Ex. L, p. 7.). Therefore, even though these issues may have been raised at subsequent levels of the grievance process, Aguilar failed to properly exhaust his claims due to his failure to properly follow all of the procedural requirements necessary under AR 740. *Ross*, 136 S. Ct. 1855 (PLRA mandates strict compliance with the administrative remedies available to inmates and court's lack to discretion to consider any "special circumstances" led to the failure to strictly comply with those requirements). Since Aguilar did not properly exhaust his claims regarding Kerner's alleged actions, the Court recommends that Defendants' Motion for Summary Judgment as to Counts III and V be granted as related to Sergeant Kerner.

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1 3. *Count V – Warden Baker*

2 In the balance of Count V, Aguilar alleges that, as a supervisor, Warden Baker
3 violated his rights by failing to ensure that he had access to adequate medical
4 treatment and medical care. (ECF No. 1, at Ex. 2, pp. 20 – 23.) Specifically, Aguilar
5 alleges that Baker acquiesced in Koehn's alleged unconstitutional conduct. (*Id.*)
6 Defendants argue that Aguilar's failure to grieve or mention Baker's acquiescence in
7 Koehn's alleged misconduct means that Aguilar did not properly exhaust his
8 administrative remedies. (ECF No. 42, at 12.)

9 In opposition, Aguilar does not present any evidence to show that he did in fact
10 file a grievance regarding or even mentioning Baker. (ECF No. 54.) Unlike his other
11 unexhausted claims where he eventually discusses the issue in his first or second level
12 grievance, Aguilar failed entirely to mention or discuss Baker's supervisory liability at
13 any level. (ECF No. 42, at Ex. M – Q.) Accordingly, Aguilar has failed to properly
14 exhaust his administrative remedies regarding Warden Baker's supervisory liability,
15 and the Court recommends that Defendants' Motion for Summary Judgment as to
16 Count V be granted as to Warden Baker.

17 D. Deliberate Indifference – Counts I and IV

18 1. *Legal Standard*

19 A prison official violates the Eighth Amendment's proscription against cruel and
20 unusual punishment when they act with deliberate indifference to the serious medical
21 needs of a prisoner. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). To establish an
22 Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that
23 the deprivation was serious enough to constitute cruel and unusual punishment—and a
24 subjective standard—deliberate indifference. *Snow v. McDaniel*, 681 F.3d 978, 985
25 (9th Cir. 2012). To meet the objective standard, the denial of a plaintiff's serious
26 medical need must result in the “unnecessary and wanton infliction of pain.” *Id.*
27 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Serious medical needs are those
28 "that a reasonable doctor or patient would find important and worthy of comment or

1 treatment; the presence of a medical condition that significantly affects an individual's
 2 daily activities' or the existence of chronic and substantial pain." *Colwell v. Bannister*,
 3 763 F.3d 1060, 1066 (9th Cir. 2014) (citation and internal punctuation omitted).

4 To meet the subjective standard of deliberate indifference, a prison official must
 5 know that a prisoner faces a substantial risk of serious harm and disregard that risk by
 6 failing to take reasonable steps to abate it. *Farmer*, 511 U.S. at 837. Only where a
 7 prison "official 'knows of and disregards an excessive risk to inmate health and safety'"
 8 is the subjective element of the test satisfied. *Id.* (quoting *Toguchi v. Chung*, 391 F.3d
 9 1051, 1057 (9th Cir. 2004)). A difference of opinion between a prisoner-patient and a
 10 prison medical provider regarding treatment does not amount to deliberate indifference.
 11 *Franklin v. Oregon, State Welfare Div.*, 662 F.2d 1337, 1344 (9th Cir. 1981). The
 12 conduct must consist of "more than ordinary lack of due care." *Farmer*, 511 U.S. at
 13 835. Not only must the defendant prison official have actual knowledge from which he
 14 or she can infer that a substantial risk of harm exists, but he or she must also draw that
 15 inference." *Id.* at 837. The standard lies "somewhere between the poles of negligence
 16 at one end and purpose or knowledge at the other[.]" *id.* at 836, and does not include
 17 "accidental or unintentional failures to provide adequate medical care . . . ," *Estelle*, 429
 18 U.S. at 105. Finally, the plaintiff must prove that he was harmed by the indifferent
 19 actions, though the harm need not be substantial. *Jett*, 439 F.3d at 1096.

20 2. Count I

21 Aguilar alleges that Koehn was deliberately indifferent to his back pain because
 22 Koehn knew he was in pain, but "refused to administer proper medical care, and
 23 properly treat [him] for his sciatic back pain and herniated disk" from June 29, 2015
 24 through July 20, 2015. (ECF No. 1-2 at 9-10.) Defendants argue Koehn was not
 25 deliberately indifferent to Aguilar's medical needs because Koehn genuinely believed
 26 that Aguilar was malingering but provided him with treatment anyway. (ECF No. 42 at
 27 14 – 15.)
 28

1 To support their position, Defendants cite to Koehn's Declaration, Aguilar's
2 Progress Notes, and a video of Aguilar. (ECF No. 42, Ex. A; ECF No. 47, Ex. D; ECF
3 No. 42, at Ex. B.) In his Declaration, Koehn states that on July 20, 2015, nursing staff in
4 the infirmary observed Aguilar "ambulating without difficulty." (ECF No. 42, Ex. A, p. 2.)
5 Koehn also states that nursing staff observed Aguilar walking around without gait
6 difficulties and exercising in the yard. (*Id.*) Defendants also point to a video preserved
7 by Koehn from July 21, 2015, showing Aguilar walking during the period he claims he
8 experienced back pain. (ECF No. 42, at Ex. B.) Finally, Koehn states that when he
9 performed a physical exam of Aguilar on July 23, 2015, it did not support Aguilar's
10 claim of lower back pain. (ECF No. 42, Ex. A, p. 2.) Koehn's progress notes
11 corroborate all the information stated in his Declaration. (ECF No.47, Ex. D, p. 13 –
12 15.)

13 To meet the subjective prong of the deliberate indifference test, Aguilar would
14 have to show that Koehn knew of a substantial risk of serious harm but disregarded
15 that risk by failing to take reasonable steps to abate it. *Farmer*, 511 U.S. at 837.
16 However, Defendants have introduced ample evidence demonstrating that Koehn
17 genuinely believed Aguilar to be malingering. (ECF No. 42, Ex. A; ECF No. 4, Ex D, pp.
18 14 – 15.) Koehn did not infer Aguilar had a substantial risk of harm because Koehn
19 believed that Aguilar was feigning injury. Thus, Aguilar is unable to meet the subjective
20 standard of the deliberate indifference test.

21 Further, Defendants argue they are entitled to summary judgment because
22 Aguilar received medical treatment between June 29, 2015 and July 20, 2015. (ECF
23 No. 42 at 15.) In Koehn's declaration, he states that he saw Aguilar on May 26, 2015,
24 and on June 18, 2015. (ECF No. 42, Ex. A.) At both visits, Koehn prescribed Aguilar
25 with medications to treat Aguilar's back pain. (*Id.*) Koehn also states that on July 8,
26 2015, nursing staff prescribed Aguilar pain medication, and on July 20, 2015, they
27 observed Aguilar walking around without difficulty. (*Id.*) Thus, contrary to Aguilar's
28 assertion that Koehn "refused to administer proper medical care, and properly treat

[him] for his sciatic back pain and herniated disk,” the record demonstrates that Aguilar received treatment from Koehn and nursing staff in the form of physical examinations and prescriptions, despite the fact that Koehn, along with nursing staff, believed that Aguilar was malingering. (ECF No. 42, Ex. A; ECF No. 47, Ex D, pp. 14 – 15.) For all the reasons listed above, the Court recommends that Defendants’ motion for summary judgment as to Count I be granted.

c. Count IV

Although the court recommends that Count IV should be dismissed for a failure to exhaust administrative remedies, this claim should also be dismissed because there is no evidence that Koehn acted with deliberate indifference with respect to this claim. As explained above, in Count IV Aguilar argues Koehn was deliberately indifferent to Aguilar’s medical needs because Koehn prescribed high blood pressure medication which caused seizures, even though Aguilar had no history of high blood pressure. (ECF No. 1, Ex. 2, p. 17.) Defendants argue that Koehn was not deliberately indifferent to Aguilar’s medical needs because Koehn genuinely believed that Aguilar had high blood pressure and did not know Aguilar would experience negative side effects until later. (ECF No. 42 at 16 – 17.) In support of their position, Defendants point to Koehn’s declaration which notes that between May 20, 2015 and August 12, 2015, Aguilar’s blood pressure ranged from 136/82 to 180/100.³ (ECF No. 42, Ex. 1, p. 3.) Based on his belief that Aguilar had high blood pressure, Koehn enrolled him in a chronic care clinic due to hypertension on July 30, 2015. (*Id.*) Therefore, the evidence submitted by Defendants establishes that Koehn believed Aguilar was suffering from high blood pressure. (*Id.*)

By contrast Aguilar has not presented any evidence to suggest Koehn knew Aguilar did not actually have high blood pressure, nor does he present any evidence which suggests Koehn knew Aguilar would experience negative side effects from the

³ Normal blood pressure is less than 120/80. Am. Heart Assoc., BP Guideline, <https://targetbp.org> (Aug. 15, 2018, at 12:42 p.m.)

1 medication. (ECF No. 52.) In fact, Aguilar admits that Koehn changed the prescription
 2 for high blood pressure medication on August 13, 2015, the day after Aguilar was
 3 released from the hospital. (ECF No. 1, Ex. A, p. 21.) This suggests that Koehn was
 4 not prescribing Aguilar high blood pressure medication to make him ill, rather, Koehn
 5 was doing so to treat what he perceived to be high blood pressure. For all the reasons
 6 discussed above, the Court recommends that Defendants' motion for summary
 7 judgment as to Count IV be granted on this additional basis.

8 D. Personal Participation

9 1. *Legal Standard*

10 "There are two elements to a section 1983 claim: (1) the conduct complained of
 11 must have been under color of state law, and (2) the conduct must have subjected the
 12 plaintiff to a deprivation of constitutional rights." *Jones v. Cmty. Redevelopment Agency*
 13 *of Los Angeles*, 733 F.2d 646, 649 (9th Cir.1984). A prerequisite to recovery under the
 14 Civil Rights Act, 42 U.S.C. § 1983, is that the plaintiff prove that the defendants deprived
 15 him of a right secured by the Constitution and the laws of the United States. *Gomez v.*
 16 *Whitney*, 757 F.2d 1005, 1006 (9th Cir. 1985). Liability under § 1983 arises only upon a
 17 showing of personal participation by the defendant. *Taylor v. List*, 880 F.2d 1040, 1045
 18 (9th Cir. 1989). A person deprives another "of a constitutional right, within the meaning of
 19 section 1983, if he does an affirmative act, participates in another's affirmative acts, or
 20 omits to perform an act which he is legally required to do that causes the deprivation of
 21 which [the plaintiff complains]." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).
 22 "[V]icarious liability is inapplicable to...§ 1983 suits, a plaintiff must plead that each
 23 Government-official defendant, through the official's own individual actions, has violated
 24 the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed.
 25 2d 868 (2009).

26 Generally, one cannot state a constitutional claim based on their dissatisfaction
 27 with the grievance process. *Grenning v. Klemme*, 34 F. Supp. 3d 1144, 1157 (E.D.
 28 Wash. 2014) Where the defendant's only involvement in the allegedly unconstitutional

conduct is “the denial of administrative grievances or the failure to act, the defendant cannot be liable under § 1983.” *Id.* (quoting *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir.1999)). However, the issue of whether responding to a grievance can rise to the level of personal participation required for a § 1983 claim was addressed in *Snow v. McDaniel*, 681 F.3d 978 (9th Cir. 2012)., *overruled on other grounds* in *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014). In *Snow*, the inmate plaintiff had submitted several grievances about the denial of a recommended hip surgery; there was testimony that the warden and associate warden were aware of the grievances, and that they had reviewed an order stating that the inmate needed a hip replacement. *Snow*, 681 F.3d at 989. Defendants argued that there was no evidence in the record that they were personally involved in any of the medical treatment decisions. *Id.* The Ninth Circuit, however, said that their review of the grievance was sufficient to demonstrate that the warden and associate warden were aware of the inmate’s serious hip condition and failed to act to prevent further harm so that the warden and associate warden were not entitled to summary judgement based on lack of personal participation. *Id.*

2. Analysis

Although the court recommends that Count V should be dismissed for a failure to exhaust administrative remedies as it relates to Warden Baker, this claim should also be dismissed because there is insufficient evidence to establish Warden Baker personally participated in any of the claims in this case. Aguilar argues that Warden Baker violated his rights because she acquiesced in Koehn’s alleged deliberate indifference. (ECF No. 1, at Ex. A, p. 20 – 23.) Specifically, Aguilar alleges that Baker has supervisory liability because she was Koehn’s supervisor at the time of the alleged incident and was aware of Koehn’s actions because of the grievances. (ECF No. 54, p. 4 – 7.) Defendants argue that Baker is not liable because she did not personally participate in any of the alleged constitutional deprivations. (ECF No. 42, at 18.) In opposition, Aguilar reiterates his argument that Baker is liable as a supervisor because she was aware of Koehn’s actions but failed to intervene. (*Id.*, at 4.)

To support their position, Defendants point to Warden Baker's Declaration. (ECF No. 42, at Ex. J.) In her Declaration, Baker states that she was not aware of Aguilar's claim that Koehn refused to treat him. (*Id.*) Further, Baker states that she reviewed Aguilar's medical kites and grievances but did not find evidence that she responded to any of them. (*Id.*) Defendants point out that this is consistent with AR 740 "because as the warden of ESP, she is not a member of the medical staff and therefore would not respond to medical issues." See ECF No. 42, Exhibit L at AR 740.05(2)(E); AR 740.06(1)(B); AR 740.07(1)(D). In order to sustain a § 1983 claim, Aguilar would have to show that Baker personally participated in the alleged constitutional deprivation, but he is unable to meet this burden. *Taylor*, 880 F.2d at 1045. Even if Aguilar could demonstrate that Baker personally participated, Koehn's actions did not violate a constitutionally protected right. For all the reasons discussed above, the Court recommends that Defendants' motion for summary judgment as to Count V as is relates to Warden Baker be granted.

IV. CONCLUSION

Based upon the foregoing, the Court recommends Defendants' motion for summary judgment be granted, and Plaintiff's cross-motion for summary judgment should be denied.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

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1 **V. RECOMMENDATION**

2 **IT IS THEREFORE RECOMMENDED** that Defendants' motion for summary
3 judgment (ECF No. 42) be **GRANTED**.

4 **IT IS FURTHER RECOMMENDED** that Plaintiff's cross-motion for summary
5 judgment (ECF No. 54) be **DENIED**.

6 **IT IS FURTHER RECOMMENDED** that judgment be entered accordingly and this
7 this case be closed.

8 **DATED:** February 19, 2019.

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12 **UNITED STATES MAGISTRATE JUDGE**
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